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Supreme Court, U.S.
FILED

Case No.: 04 1118 DEC 10 2004

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In The

Supreme Court of the United States

DAVID CRAIG KANZ,

Petitioner,

vs.

MATTHEW J. FRANK, and THE DEPARTMENT OF CORRECTIONS OF THE STATE OF WISCONSIN,

Respondents.

On Petition For a Writ of Certiorari
To the Seventh Circuit Court of Appeals

Supplement to Appendix "C" Of the Verified Petition for Writ of Certiorari

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Supplement to Appendix "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID C. KANZ

Petitioner,

v. Case No. 03-C-0728

JON E. LITSCHER, WISCONSIN DEPARTMENT OF CORRECTIONS,

Respondents.

ORDER

Pro se David C. Kanz, ("Kanz") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. For the reasons stated below, the court must deny the petition.

BACKGROUND

On October 16, 1996, Kanz was convicted of forgery, in violation of Wis. Stat. § 943.38(2) and criminal slander of title, in violation of Wis. Stat. § 943.60(1). (See Amended Petition, Exhibit 1.) Kanz was sentenced to two years of probation concurrent to the prison term for the forgery count.

On December 9, 1998, the Wisconsin Court of Appeals dismissed Kanz's appeal from his conviction because Kanz failed to file his brief on numerous occasions. The full order reads:

> The appellant takes this appeal from a felony conviction. His brief was originally due on September 3, 1998. The briefing schedule was then tolled pending a decision on the appellant's motion for summary reversal. On September 21, 1998, he requested more time to file his brief and, on September 25, 1998, we extended his deadline until November 18, 1998.
>
> On November 16, 1998, the appellant requested yet another extension. He stated that he was too busy looking for work to complete his brief. By Order dated November 19, 1998, we denied his request for additional time. His November 16, 1998 motion did not state good cause and failed to explain how he could file lengthy motions in this court and federal court while maintaining that he could not file a brief. He was given a final briefing deadline of November 25, 1998. Although two weeks have passed from that final deadline, the appellant remains delinquent.

(State of Wisconsin v. Kanz, 98-1761-CR, December 9, 1998 decision, at 1-2.)

On February 25, 1999, the Wisconsin Supreme Court denied Kanz's petition for review.

Kanz filed his federal habeas petition on August 1, 2003.[1] The basis of Kanz's federal habeas petition is that Kanz was denied counsel at his trial. (See Amended Petition, ¶ 22.) The trial court determined that Kanz had been advised of his right to counsel and that his conduct constituted a waiver of counsel. (See Amended Petition, Exhibit 2, at 54.)

Noting that the one-year statute of limitation had expired many years before Kanz filed his petition, this court ordered Kanz to demonstrate why his petition should not be dismissed as untimely. (See August 15, 2003 order, at 2.) This court also ordered Kanz to demonstrate why his petition should not be dismissed on the basis of procedural default. (See October 22, 2003 order, at 1-3.) Kanz has filed a brief purporting to show cause why his petition should not be dismissed.

DISCUSSION

The court must dismiss Kanz's petition because it is untimely. The Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"] enacted a one-year limitation period for filing a petition for habeas corpus. 28 U.S.C. § 2254(d). The limitation period applies to all habeas petitions filed after April 23, 1997, one year following the effective date of the amendment. *Lindh v. Murphy*, 96 F3d. 856, 866 (7th Cir. 1996) (en banc), *rev'd*

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[1] Although Kanz states that he has not previously filed any petitions, applications, or motions with respect to the judgment in any state or federal court, (see Amended Petition, ¶14), Kanz's petition is inaccurate. Kanz attaches an April 24, 2003 order in Kanz v. State of Wisconsin, 03-C-0192 (E.D. Wis. April 24, 2003) in which the Honorable Thomas J. Curran dismissed Kanz's petition without prejudice because Kanz failed to file his petition with the court approved form. Because the dismissal was without prejudice, Kanz's petition in this action is not a second or successive habeas petition. See U.S.C. §2254(b).

on other grounds, 521 U.S. 320 (1997). Those whose convictions predated AEDPA were given a year after its enactment on April 24, 1996-i.e. until April 23, 1997-within which to file their habeas petitions. See id.; see also *Gendron v. United States*, 154 F3d. 672, 675 (7th Cir. 1998).

The one-year filing period began running in May 1999, ninety days after the Wisconsin Supreme Court denied the petition for review on February25, 1999. See *Anderson v. Litscher*, 281 F.3d 672, 674-75 (7th Cir. 2002) (noting that the period begins to run on the expiration of the time to petition the United State Supreme Court for certiorari). Kanz's time for filing a federal habeas petition, therefore, expired in May 2000. Kanz is more than three years late in filing his petition.

Kanz argues that the court should equitably toll the limitations period because he was denied trial and appellate counsel in state court and because he "could not, despite the exercise of reasonable diligence, have discovered all the information needed in order to be able to file his claim on time." (See Petitioner's October 31, 2003 brief, at 26.) (citing *Johnson v. McCaughtry*, 265 F.3d 559, 565 (7th Cir. 2001). Kanz argues: "That because of the denial of counsel, to which the undersigned has a right, we will never know if counsel would have complied with the procedural requirements of the AEDPA." (Petitioner's October 31, 2003 brief, at 29.)

Kanz's lack of counsel in state court provided no basis for his failure to file a federal habeas petition in a timely manner. There is no constitutional right to counsel in a federal habeas corpus proceeding. See *Piggie v. Cotton*, 343 F.3d 660 (7th Cir. 2003). Therefore, even if Kanz were assigned counsel in state court, Kanz would

not have been entitled to any assistance from counsel in filing his federal habeas petition in a timely manner.

Kanz's argument that he lacked information to be able to file his petition on time similarly missed the mark. Equitable tolling "excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information needed in order to file his claim on time." *Taliani v. Chrans*, 189 F.3d 597, 597 (7th Cir. 1999). The doctrine is applied sparingly and only when "extraordinary circumstances" far beyond the prisoner's control prevented timely filing. *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even in diligence.").

Kanz never describes the information that he needed to file his claim on time. Te basis of Kanz's petition is denial of trial counsel. The only information that Kanz needed to file his habeas petition was the information that he was denied counsel at trial, information which Kanz undoubtedly possessed. Moreover, Kanz's lack of legal knowledge or any alleged deficiencies in the prison law library are not the type of "extraordinary circumstances" that would justify equitable tolling. *Johnson*, 265 F.3d at 566 (finding that the "circumstances of incarceration" do not warrant equitable tolling); *Owen v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000) ("Owens is young, has limited education, and knows little about the law. If these considerations delay the period of limitation until the prisoner has spent a few years in the institution's law library, however, then §2244(d)(1) might as well not exist; few prisoners are lawyers.") As a district court in this circuit has recently

states, "habeas relief, by definition, is almost always sought by an incarcerated petitioner,' and proceeding pro se with limited legal skills and limited access to legal materials in not an exceptional circumstance for a habeas petitioner." *Gilyana v. Sternes*, 2001 WL 1654722, at *5 (N.D. Ill. Dec. 20, 2001), *quoting Johnson*, 265 F.3d at 566.

Because the court finds that Kanz's habeas petition is untimely, the court need not consider whether Kanz's petition should be also be dismissed on the basis of procedural default.

Accordingly,

IT IS ORDERED that the petition be and the same is hereby DENIED;

IT IS FURTHER ORDERED that this action be and the same is hereby DISMISSED; and

IT IS FURTHER ORDERED that the petitioner's motion for immediate release be and the same is hereby DENIED as moot.

The clerk is directed to enter judgment accordingly.

Dated in Milwaukee, Wisconsin this 12th day of January, 2004.

BY THE COURT

/s/ J. P. Stadtmueller
U.S. District Judge